FILED
MAR 2 [illegible]
CLERK

No. 99-1249

IN THE
SUPREME COURT OF THE UNITED STATES

AT&T Corp. and MCI WORLDCOM
Network Services, Inc.,
Petitioners,

v.

CINCINNATI BELL TELEPHONE COMPANY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DOUGLAS E. HART *
FROST & JACOBS LLP
2500 PNC CENTER
201 EAST FIFTH STREET
CINCINNATI, OH 45202
(513)651-6709

Counsel for Respondents
Cincinnati Bell Telephone
Company, et al.

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

31 pp

QUESTION PRESENTED

Cincinnati Bell Telephone Company disagrees with Petitioners' framing of the issue presented. The Fifth Circuit did not overturn the FCC's assessment of intrastate revenues on the basis that the Telecommunications Act of 1996 did not "apply" to intrastate matters. Rather, that court held that § 254 did not reflect enough of an unambiguous grant of jurisdiction to the FCC to overcome the presumption in § 2(b) prohibiting FCC jurisdiction over intrastate matters. Nor did the court determine that the FCC could not "consider" a carrier's intrastate operations and revenues in implementing the federal universal service programs. Rather, the court determined that the FCC had no basis for asserting jurisdiction over intrastate revenues for that purpose. Therefore, Cincinnati Bell Telephone Company would restate the question presented as:

Whether the FCC has authority under § 254 of the Telecommunications Act of 1996 to assess intrastate revenues for purposes of funding federal universal service programs.

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit are identified in the Petition at pages ii through v.

Pursuant to Rule 29.6 of the Rules of this Court, Cincinnati Bell Telephone Company states that it is a wholly owned subsidiary of Cincinnati Bell Inc., dba Broadwing Inc. Cincinnati Bell Telephone Company has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 14

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

AT&T Communications of the Mountain States, Inc. v. Public Service Commission, 625 F. Supp. 1204 (D. Wyo. 1985) 23

AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721 (1999) . . . . . *passim*

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 16

Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) . . . 1, 11, 15, 16, 17, 20, 27

NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984) 3

Smith v. Illinois Bell Telegraph Co., 282 U.S. 133 (1930) 15

STATUTES & LEGISLATIVE HISTORY

47 U.S.C. § 151 15
47 U.S.C. § 152 15
47 U.S.C. § 152(b) 8, 15, 17, 27
47 U.S.C. § 201 . . . . . 17, 19
47 U.S.C. § 201(b) 11, 17, 20, 21, 22
47 U.S.C. § 251 . . . . . 16, 17
47 U.S.C. § 252 . . . . . 17, 21
47 U.S.C. § 254 . . . . . *passim*
47 U.S.C. § 254(b) 3
47 U.S.C. § 254(b)(4) 3, 4
47 U.S.C. § 254(b)(5) 4, 22
47 U.S.C. § 254(b)(7) 4
47 U.S.C. § 254(d) 18, 19, 22, 23
47 U.S.C. § 254(f) 13, 16, 18, 19, 23, 24, 26
47 U.S.C. § 254(h) 3, 5, 10, 11
47 U.S.C. § 254(h)(1)(B) 22, 26
47 U.S.C. § 254(h)(2) 4

47 U.S.C. § 254(k) 22
S. 652, 104th Cong., 2d Sess.(1996) 16, 24

House Conference Report 104-458, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S. CODE CONG. & AD. NEWS 144 5

REGULATIONS

47 C.F.R. § 36.125 10
47 C.F.R. § 54.703(b) 6

FEDERAL AGENCY DECISIONS

Dissenting Statement of Commissioner Harold Furchtgott-Roth re *Commonwealth of Virginia State Corporation Commission v. MCI Telecommunications Corporation*, File No. E-99-01, rel. March 22, 1999 8

Dissenting Statement of Commissioner Harold Furchtgott-Roth Regarding Federal State Joint Board on Universal Service, Report to Congress, CC Docket 96-45, rel. April 10, 1998 8

In the Matter of the Federal-State Joint Board on Universal Service, 12 F.C.C. Rcd 8776 (1997) 1, 4, 6, 7, 10, 18, 27

In the Matter of Federal-State Joint Board on Universal Service, Seventh Report and Order and Thirteenth Order on Reconsideration, CC Docket No. 96-45, released May 28, 1999 . . 18

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, released February 26, 1999 6

Proposed Fourth Quarter 1999 Universal Service Contribution Factor for November and December 1999, DA 99-2109, released October 8, 1999 14

Statement of Commissioner Harold Furchtgott-Roth Regarding The Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998 7

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT CINCINNATI BELL TELEPHONE COMPANY'S BRIEF IN OPPOSITION

Cincinnati Bell Telephone Company is a local telephone company that has operated in the Greater Cincinnati area for over a century. Cincinnati Bell filed a Petition for Review from the FCC's May 7, 1997 First Report and Order on Universal Service,[1] challenging the FCC's authority to assess intrastate revenues for purposes of funding federal universal service programs. The Fifth Circuit granted Cincinnati Bell's Petition for Review and struck down the FCC's rule. The FCC and AT&T both requested the Fifth Circuit to rehear this issue *en banc*. No active judge of the Fifth Circuit requested that the court be polled for *en banc* review and the Fifth Circuit denied rehearing.

Petitioners have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. First, the decision of the court of appeals is not contrary to this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999). The decision below is consistent with *Iowa Utilities Board* and *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). Second, Petitioners' contentions that the decision below has an "enormous practical impact" on the companies that must contribute to the FCC's subsidy programs, on the FCC's ability to administer those programs, and potentially on the states, are without merit and present insufficient reasons for this Court to review the decision. Third, the FCC's universal service funding rules had created

---

[1] *In the Matter of the Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997) ("*Order*")(cited hereinafter as "¶ __").

an anticompetitive discrimination against carriers with substantial intrastate revenue. The Fifth Circuit's decision remedied that problem and should not be disturbed.

STATEMENT OF THE CASE

"Universal service" is the concept of promoting wide subscribership to telephone services by assuring that certain basic services are available to all Americans at affordable prices. Because there is a wide variation in the cost of providing telephone service throughout the United States, particularly between urban and rural areas, universal service programs are designed to subsidize carriers in areas where the cost of providing service is high. Universal service has been funded for the most part by a series of implicit subsidies. For example, rates charged to businesses are higher than those charged to residential customers. Rates in urban areas, where costs are generally lower, are averaged with rural rates, so that the rural customer does not have to pay the full cost of service. With the advent of local exchange competition, those customers paying the highest rates have become the easiest target for new entrants who generally do not offer service to the high cost customers. New entrants could capture the revenues used to fund universal service subsidies without using them to support low cost service to high cost customers.

Congress understood that introduction of competition would disrupt the complex system of implicit subsidies and jeopardize the provision of universal service. Thus, it enacted § 254 of the 1996 Act, requiring the FCC to develop a new mechanism for explicit funding of universal service. The Act seeks to make all universal service support mechanisms explicit, *i.e.*, the sources and uses of funding would be specifically identifiable.

"Universal service" was not specifically defined prior to the 1996 Act.[2] Section 254 requires the FCC to identify the services to be supported by universal service funding and to establish the means for financing federal support. In addition to what has traditionally been thought of as universal service (the availability of basic telecommunications services at affordable prices) the statute created new programs to subsidize services to schools, libraries and rural healthcare facilities. § 254(h). The statute instructed the FCC to consider those telecommunications services that "are essential to education, public health, or public safety" in determining how universal service was to be defined for purposes of those programs. These services would be available to the end user at a discount, with the provider of the service drawing from the fund to reimburse itself for the discount.

Section 254(b) established six basic principles upon which the FCC was to build its universal service policies and authorized the FCC to adopt additional principles. Among the six mandatory principles Congress established in § 254(b) is that: "All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." § 254(b)(4).

---

[2] Petitioners' reliance upon *NARUC v. FCC*, 737 F.2d 1095, 1108 & n.6 (D.C. Cir. 1984), as defining universal service is unpersuasive. *NARUC* did not purport to define "universal service" and did not make its meaning a term of art. Nowhere did *NARUC* say that "universal service" was understood to mean intrastate services. *NARUC* was not about universal service; it concerned the revision of certain interstate access charges from a usage sensitive basis to flat rate end user charges. These were not charges in connection with local service, but interstate charges for use of a local telephone company's property for interstate access service.

In addition, § 254(b)(7) permitted the FCC to adopt "[s]uch other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act." Pursuant to that authority, the FCC adopted an additional principle of "competitive neutrality." ¶ 46. The FCC defined this principle as follows: "Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another." ¶ 47. Competitive neutrality was already a required feature of the school, library and health care programs by statute. § 254(h)(2).

The FCC stated that competitive neutrality in the collection and distribution of funds was necessary to promote "a pro-competitive, de-regulatory national policy framework." ¶ 48. It made a commitment to develop competitively neutral rules to ensure that no entity received an unfair competitive advantage that might skew the marketplace or inhibit competition. The FCC also found that § 254(b)(4), which provides for "equitable and nondiscriminatory contributions," and § 254(b)(5), which provides that support mechanisms should be "specific and predictable," included the concept of "economic efficiency" to the extent that they promote competition through an open and competitively neutral marketplace. ¶ 55.

A driving force behind designating service to schools, libraries and rural healthcare providers as "universal service" was to promote access to the Internet and advanced services. These programs were originally in a separate part of the Senate bill, § 310, also known as the Snowe-Rockefeller-

Exon-Kerrey Amendment. The Conference Report[3] described the purposes of these programs:

> New subsection (h) of section 254 is intended to ensure that health care providers for rural areas, elementary and secondary school classrooms, and libraries have affordable access to modern telecommunications services that will enable them to provide medical and educational services to all parts of the Nation.
>
> The ability of K-12 classrooms, libraries and rural health care providers to obtain access to advanced telecommunications services is critical to ensuring that these services are available on a universal basis. The provisions of subsection (h) will help open new worlds of knowledge, learning and education to all Americans -- rich and poor, rural and urban. They are intended, for example, to provide the ability to browse library collections, review the collections of museums, or find new information on the treatment of an illness, to Americans everywhere via schools and libraries. This universal access will assure that no one is barred from benefiting from the power of the Information Age.

There is nothing in the legislative history to indicate that schools, libraries and rural health care providers were included in universal service in order to promote the availability of local telephone service. To the contrary, the

---

[3] House Conference Report 104-458, 104th Cong., 2d Sess. (1996) *reprinted in* 1996 U.S. CODE CONG. & AD. NEWS 144.

clear reason for inclusion was to promote access to interstate services.[4]

In the Order, the FCC defined the services to be supported by federal universal service programs and established separate mechanisms for funding the high-cost universal service fund and the school, library and rural health care funds. Contributions to the high-cost universal service fund were assessed on only interstate end user telecommunications revenues. The FCC decided to assess contributions to the school, library and rural health care funds from interstate telecommunications carriers based upon both their interstate and intrastate end user telecommunications revenues. 47 C.F.R. § 54.703(b). However, the FCC limited the recovery of the cost of all universal service fund assessments to charges for interstate services. ¶ 837.

Because the Joint Board did not recommend an interstate and intrastate assessment base for the high cost and low-income universal service programs, the FCC maintained historic jurisdictional lines and assessed the support for these programs solely from interstate revenues. ¶ 772. Also, because the Joint Board did not recommend that carriers recover their contributions for those funds via rates for intrastate services, the FCC concluded that it should maintain its traditional method of providing for recovery through rates for interstate services only. ¶ 809. The Joint Board recommended that support for eligible schools, libraries, and rural health care providers be based on interstate and

---

[4] The FCC has determined that Internet traffic is predominantly interstate in nature. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, FCC 99-38, released February 26, 1999.

intrastate telecommunications revenues. ¶ 810. However, with respect to cost recovery, the FCC maintained historic jurisdictional lines and only permitted carriers to recover the cost of their universal service contributions through interstate rates. ¶ 773. The FCC asserted the power to assess intrastate revenues for the high cost fund and to require carriers to go to their respective state commissions for cost recovery of the portion of the assessment attributable to intrastate revenue, but chose not to exercise this asserted authority at that time.

In specifying how carriers would contribute to universal service funding and recover their costs, the FCC ignored the statutory principles. Basing contributions on both interstate and intrastate revenues, but restricting cost recovery to interstate services, violated the principle of competitive neutrality because it disadvantaged carriers with predominantly intrastate revenues vis-a-vis interstate carriers. Basing contributions on both interstate and intrastate revenues was not competitively neutral or nondiscriminatory because carriers that provide interstate and intrastate services would have to recover more relative costs from interstate services than carriers that provide predominantly interstate services.

There was a dispute from the beginning whether the FCC could assess intrastate revenues. Despite dissents by some state members of the Joint Board, ¶ 812, and one FCC Commissioner, the FCC adopted the Joint Board's recommendation that a carrier's contribution to support for the school, library, and rural health care funds be assessed based on contributors' interstate and intrastate revenues. ¶ 811. Commissioner Furchtgott-Roth has repeatedly dissented and maintains that assessment of intrastate revenues is unlawful and discriminatory.[5]

---

[5] *See, e.g.*, Statement of Commissioner Harold Furchtgott-Roth Regarding The Second Quarter 1998 Universal Service Contribution Factors, rel. March 20, 1998; Dissenting Statement of Commissioner

The FCC contended it was not violating § 2(b) of the Act, 47 U.S.C. § 152(b), because it was not engaging in "rate regulation" of intrastate services. This analysis took a narrow view of § 2(b). That provision is not limited to "regulation" per se as the FCC contended, but is a limitation on jurisdiction -- jurisdiction with respect to "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Section 2(b) does not only forbid the FCC from regulating the rates carriers charge for intrastate services; it denies the FCC jurisdiction to impose any charge in connection with intrastate service. The direct assessment of intrastate revenues is a direct imposition of a charge in connection with intrastate service. The carrier is only responsible for paying this charge if it provides intrastate services and the amount of the charge is directly proportional to the volume of intrastate service that it provides.

Petitioners' Statement of the Case presented a limited view of universal service, intended to demonstrate that universal service necessarily means intrastate service. Their recitation was not so much about universal service as it was the federal-state division of the cost of local exchange companies' networks. The same facilities are used to make local and long distance telephone calls. State commissions only have authority over intrastate activities and the federal authorities only have authority over interstate activities. Where the same facilities are used for both purposes,

---

Harold Furchtgott-Roth Regarding Federal-State Joint Board on Universal Service, Report to Congress, CC Docket 96-45, rel. April 10, 1998; Statement of Commissioner Harold Furchtgott-Roth re: *Commonwealth of Virginia State Corporation Commission v. MCI Telecommuncations Corporation*, File No. E-99-01, rel. Mar. 22, 1999, all available at www.fcc.gov/commissioners/furchtgott-roth/sch&lib.html.

regulators have to devise methods of dividing responsibility for such jointly used facilities.

The traditional method for dividing responsibility between the federal and state governments has been to allocate some portion of the cost of the local telephone network to the interstate jurisdiction. The cost of this portion of the network is recovered primarily through "access charges," which are imposed on interstate carriers and end users for usage of the local network to initiate and terminate interstate calls. The balance of the cost of the local network is allocated to the intrastate jurisdiction and is recovered through local rates and rates for intrastate toll service. Petitioners have generally described the history of how such costs have been allocated between the FCC and the states. However, this federal-state allocation of responsibility is independent of the concept of universal service. The access charge system did not begin as a universal service program, but as a mechanism for allocating the costs of a shared network to the interstate and intrastate jurisdictions.

The federal-state allocation of costs described by Petitioners is unrelated to the subsidies flowing from low cost, high rate customers to high cost, low rate customers. Those subsidies exist within the intrastate rates of an individual local telephone company. The access charges paid by interstate carriers to local companies are payments for usage of the local facilities for interstate purposes.

Petitioners' do not claim that the FCC has ever asserted jurisdiction over intrastate revenue before. Federal universal service programs have relied upon interstate revenues for their funding, even if some of the services being supported were intrastate services. At best, the FCC may have treated certain intrastate costs as if they were interstate costs. For example, the DEM program allowed certain LECs to assign a larger portion of their switching costs to the

interstate jurisdiction. ¶ 212.[6] This had the effect of relieving local ratepayers of some of the burden of covering these costs and spreading that burden over interstate ratepayers. The majority of these costs were included in interstate access charges -- which are generally paid by carriers, not end users -- causing the costs to be recovered by long distance carriers as part of their rates for interstate calls. The FCC had never before required interstate carriers to pay money into any universal service fund based upon intrastate revenues. Nor is there any history of the FCC forcing carriers to recover interstate costs from intrastate ratepayers.

Petitioners assert that this case concerns the policy of promoting universally available local telephone service. That is not what this case is about. This case is about whether the FCC has the power to assess intrastate carriers' intrastate revenues for federal programs. It does not concern the FCC's ability to choose how to spend the funds it raises -- it concerns the limits on the FCC's power to raise revenue. Petitioners overstate the scope of the court of appeals' decision. The court did not say that the FCC had no ability to act with respect to intrastate matters under § 254 or that it could not consider intrastate matters in determining what to do about universal service -- it simply held that the FCC had no jurisdiction to require carriers to support interstate programs with intrastate funds.

This case involves only the school, library and rural health care programs, which were entirely new programs that did not exist before the 1996 Act. The history of jurisdictional separations, access charges and universal service has nothing to do with these programs. The limits of what the FCC can and cannot do to fund these programs comes directly from the statutory text. Whatever direction § 254 may give the FCC with respect to services that it may support, there is only one direction with respect to the

---

[6] *See* 47 C.F.R. § 36.125.

available source of funding: "telecommunications carrier[s] that provide[] interstate telecommunications services."

The court of appeals did not ignore this Court's decision in *Iowa Utilities Board*. The Fifth Circuit had already held oral argument when this Court released its decision. The court of appeals invited any party to submit a letter brief addressing the applicability of *Iowa Utilities Board* to the question of the FCC's jurisdictional authority. The court identified three appropriate subjects for discussion: 1) jurisdictional challenges to the FCC's decision to limit the criteria that State commissions may consider when assessing a carrier's eligibility for high-cost universal service support; 2) jurisdictional challenges to the FCC's implementation of the "no-disconnect" rule prohibiting carriers receiving high-cost support from disconnecting local service to low-income consumers who have failed to pay toll charges; and 3) jurisdictional challenges to the FCC's decision to assess both the interstate and intrastate revenues of carriers in order to fund the § 254(h) ("schools and libraries") program. While Petitioners both submitted letter briefs, each chose to limit their comments to issue 1); neither addressed the power of the FCC to assess intrastate revenues to support federal universal service programs.

The court of appeals carefully considered and applied the holding of *Iowa Utilities Board* and *Louisiana*. It determined that § 254 did not provide an unambiguous grant of authority to the FCC to assess intrastate revenues, hence, the FCC's plan was barred by § 2(b). Unlike *Iowa Utilities Board*, which concerned the power of the FCC to legislate rules under § 201(b), this case involves the FCC's power to raise revenues. The court of appeals correctly decided that § 254 lacks an unambiguous grant of authority for the FCC to raise funds from intrastate sources.

The Fifth Circuit's ruling did not undermine the "equitable, nondiscriminatory, and competitively neutral"

nature of universal service funding. All interstate carriers will now contribute equally to the fund based upon their interstate end user revenues. All carriers will recover the cost of their contribution from their interstate customers. This is equitable, nondiscriminatory and competitively neutral. To the contrary, the FCC's original funding plan for the school, library and rural health care funds was discriminatory. The effect of assessing interstate and intrastate revenues, but limiting cost recovery to interstate customers, required carriers with predominantly intrastate revenues to recover much larger amounts from their interstate customers than carriers who had little intrastate revenue. Thus, carriers with predominantly intrastate revenues were at a price disadvantage for their interstate services. While the Fifth Circuit did not find it necessary to reach Cincinnati Bell's discrimination argument to decide the case, its decision rectified the discrimination and made the system competitively neutral.

Petitioners' predictions of dire consequences from the court's ruling are unfounded and illogical. The FCC does not need access to intrastate revenues to assure a "sufficient" source of funding. Even when the FCC included intrastate revenues in the contribution base, it still required carriers to recover all of their universal service contributions through interstate rates. No matter how much a carrier paid into the fund based on intrastate revenue, it recovered all of its contribution from interstate customers, so the ultimate source of funding was always interstate customers. The sufficiency of the fund is no different when intrastate revenues are ignored. The total amount of money raised is exactly the same and the resulting cost to interstate customers is exactly the same.

Petitioners assert that the Fifth Circuit decision "threatens the implementation and enforcement of numerous other provisions of Section 254 in the future" and that it

"threatens to reduce overall funding for the universal service system, thereby undermining the states' ability to ensure that communications services are widely available to their citizens." Petitioners do not explain how this could occur. The Fifth Circuit affirmed the vast majority of what FCC did with respect to universal service, including its designation of services that qualified for support, the method for calculating support for high cost areas, the method of calculating revenue benchmarks, the decision of how much support to provide, the determination of which carriers were required to contribute, the timing of the transition from implicit to explicit subsidies, the designation of services to be supported by the school, library and rural healthcare funds, and the designation of service providers who were eligible to receive payments. The only issues on which the Fifth Circuit reversed were the FCC's prohibition on states imposing additional eligibility requirements, its requirement that cost recovery must occur only through access charges, its exercise of control over local service disconnection for nonpayment, and assessment of contributions on intrastate revenues. Curiously, while most of those issues concerned the FCC's jurisdiction over intrastate matters, Petitioners raise only the last issue for review. This undermines the sincerity of Petitioners' concern for these other issues.

Finally, the Fifth Circuit's decision did not undermine the states' ability to provide universal service, but preserved it. To the contrary, if the FCC could assess intrastate revenues for federal universal service, States might be preempted from reaching those revenues for their own universal service programs. Section 254(f) requires that state programs "not rely on or burden Federal universal service support mechanisms." If the FCC could use intrastate revenue as a funding source, it could limit the States' ability to do so as a "burden" on the federal mechanism.

REASONS FOR DENYING THE PETITION

The question presented in this case is not of exceptional importance. It involves a simple matter of statutory construction that the court of appeals decided correctly. The Fifth Circuit's opinion is not a departure from § 254 and does not conflict with this Court's decision in *Iowa Utilities Board*. Nor is there any substantial practical impact on the companies that must contribute to universal service, on their customers, on the FCC's ability to administer those programs, or on the states, that deserves this Court's attention.

The decision below does not jeopardize federal universal service programs, which are operating effectively without resort to intrastate revenues. The high-cost fund has never assessed intrastate revenues, so the decision below had no effect whatsoever on that program. The school, library and rural healthcare funds have successfully transitioned from being funded by assessments on both interstate and intrastate revenues to only interstate revenues. The FCC has revised its contribution rules to collect all of the funds necessary from only interstate revenues.[7] As a direct result, local carriers who previously recovered their universal service contributions based on intrastate revenues through their interstate access charges have reduced their access charges to the interexchange carriers. Thus, on a macroeconomic scale, the increased contributions to the fund now made by interstate carriers were offset by the lower access charges that they now pay local companies. The only thing of practical importance to Petitioners is that they would prefer that local carriers bill their customers for universal service cost recovery instead of long distance carriers having to do so. This is not a legal

---

[7] *Proposed Fourth Quarter 1999 Universal Service Contribution Factor for November and December 1999*, DA 99-2109, released October 8, 1999.

problem that should draw the time and attention of this Court.

1. The Telecommunications Act has long established a system of dual state and federal regulation over telephone service. In *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), the Court made clear that the provision of telephone service is a matter having both intrastate and interstate components. The intrastate component, a matter of primarily local concern, is subject to exclusive state regulation while the interstate component, which affects interstate commerce, is subject to federal regulation. In 1934, when Congress created the FCC and transferred the former telecommunications authority of the ICC to the new agency, it preserved the dual federal/state jurisdictional principle of *Smith v. Illinois Bell* in § 2 of the Act, 47 U.S.C. § 152. The Act granted the FCC the authority to regulate "interstate and foreign commerce in wire and radio communication," 47 U.S.C. § 151, while expressly denying that agency "jurisdiction with respect to . . . intrastate communication service . . . ." 47 U.S.C. § 152(b). *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 360 (1985). Section 2(b) states that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ." "By its terms, this provision fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate service." *Louisiana*, 476 U.S. at 370.

In *Louisiana*,[8] the Court stated that § 2(b) is an explicit congressional denial of power to the FCC and that Congress could override § 2(b)'s command only by unambiguously

---

[8] Petitioners have virtually ignored *Louisiana*, referring to it only in a footnote at the end of their petition with respect to a minor unrelated point.

granting the FCC authority over intrastate telecommunications matters or by directly modifying § 2(b). The earlier Senate version of the Act, S. 652, contained a provision, not adopted, that would have revised § 2(b) to allow the FCC to exercise jurisdiction over intrastate matters on subjects covered in Part II of Title II of the Act (§§ 251-61). This omission in the final statute of any change to § 2(b) indicates the intent not to grant the FCC jurisdiction over intrastate revenues. Thus, unless the FCC could point to an unambiguous grant of authority for it to assess intrastate revenues for purposes of funding a federal universal service fund, § 2(b) precluded it from making such an assessment. There is no unambiguous grant of such authority.

Section 254 did not blur the bright line between interstate and intrastate matters; it reinforced it. Regardless of whether intrastate services may be supported by federal universal service funding, nowhere did Congress empower the FCC to use intrastate revenues to fund the federal programs. States are free to assess intrastate revenues within the context of their intrastate jurisdiction and § 254(f); however, the FCC may not do so without an express Congressional directive that § 2(b)'s prohibition is inapplicable. Section 254 grants the FCC primary responsibility for defining the services that will be supported by federal universal service; but it does not grant the FCC authority to assess intrastate revenues to fund the programs. The FCC's determination that it has authority to assess intrastate revenues conflicts with the plain meaning of the Act and deserves no deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

In *Iowa Utilities Board*, the Court left intact its earlier ruling in *Louisiana*, which had rejected the FCC's attempt to regulate depreciation practices for intrastate services.

Louisiana requires both an express application of the Act to intrastate matters and an express grant of jurisdiction to the FCC to regulate such matters. In that case, there was no express statement in the Act that it was intended to apply to intrastate depreciation. Section 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also, by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction. *Louisiana*, 476 at 376-77, n.5.

While it did not change its *Louisiana* holding, in *Iowa Utilities Board* the Court found that §§ 251 and 252 of the Telecommunications Act of 1996 did apply to local matters. The Court then determined that the general rulemaking power in § 201(b) of the Act gave the FCC authority to issue regulations interpreting those provisions of the Act. Thus, the Court found that these new substantive provisions, coupled with the general rulemaking powers in § 201(b), satisfied the *Louisiana* test.

This case does not involve the same provisions of the 1996 Act considered by the Court in *Iowa Utilities Board*. The Court's conclusion that the FCC has jurisdiction under § 201 to issue rules interpreting §§ 251 and 252 is not applicable to the FCC's ability to raise revenue pursuant to § 254. That section must be independently analyzed to determine, first, whether it unambiguously applies to intrastate communications services and, second, if it does, whether Congress gave the FCC the authority to take the actions it did. Even though it holds general rulemaking powers under § 201(b), the FCC's jurisdiction to promulgate rules must, in the end, be constrained by the terms of the Act itself. Simply because a statute may have some application to intrastate service does not grant the FCC carte blanche authority to write rules that contradict the plain meaning of the statute. Where the Act contains provisions clearly intended to displace the FCC's authority over intrastate

matters, § 201(b) must yield to the more specific provisions of the Act. In the case of universal service funding, Congress did exactly that.

Petitioners' contention that § 254 applies to intrastate telecommunications service is far from undisputed. The term "telecommunications service" is a generic term that does not specify whether the service is interstate or intrastate. There is nothing in § 254 to indicate that the FCC is required to subsidize intrastate services, as contrasted with that portion of the local network used to provide interstate service, that it has historically supported.[9] In any event, whether the FCC has authority to provide federal universal support for intrastate services is not determinative in this case. All of Petitioners' arguments that § 254 "applies" to intrastate service rest on conclusions about the services that may be supported by the federal fund. The issue in this case is not which services can be supported; it is about the fundraising mechanisms. Petitioners point to no unambiguous authority in the Act allowing the FCC to use intrastate revenues as a source of funds.

Wherever § 254 mentions intrastate services, it does so only in connection with action to be taken by States, not

---

[9] Consistent with that approach, the FCC initially stated that it "need only support interstate costs." It would have contributed only 25% of the cost of universal service support, the traditional percentage of the local loop that was assigned to the interstate jurisdiction, leaving the balance to the States to support. ¶ 268-69. Later, the FCC changed its approach and stated that it would fund that portion of the high cost need that a State could not support internally with intrastate sources. *In the Matter of Federal-State Joint Board on Universal Service*, Seventh Report and Order and Thirteenth Order on Reconsideration, CC Docket No. 96-45, released May 28, 1999, ¶ 34. Under this system, states that can fund their high cost areas entirely with intrastate universal service funds may receive no federal funding at all.

the FCC. Both §§ 254(d) and (f) govern the funding of universal service. Section 254(d) provides "[e]very telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." By contrast, § 254(f) provides: "Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." In these parallel but separate provisions, Congress clearly gave the FCC authority over only interstate telecommunications revenues and the States authority over only intrastate telecommunications revenues. Carriers who provide interstate services are not required to contribute to state universal service funds on interstate revenue and carriers who provide intrastate services are not required to contribute to federal universal service funds on intrastate revenue.

Of course, almost all carriers provide both interstate and intrastate services and, thus, would contribute to both federal and state funds. However, such contributions would be based upon the services they provide in those respective jurisdictions. The FCC's interpretation of § 254(d) would have allowed it to require interstate and intrastate carriers to contribute to the federal school, library and rural health care funds. Had Congress intended that result, it would have written these provisions differently. The FCC's interpretation of § 254(d) contradicts the plain language of the statute. The general rulemaking power in § 201 of the Act does not confer any authority to rewrite the basic terms of the statute.

The FCC's rulemaking authority over matters covered by the Act cannot be construed as the power to raise revenue. Thus, a federal statute's mere application to certain intrastate

matters is insufficient to confer jurisdiction upon the FCC to assess intrastate revenues; the statute must also directly grant the FCC such intrastate authority in order to overcome the operation of § 2(b). The FCC cannot confer power upon itself where Congress has not. *Louisiana*, 476 U.S. at 374-75 ("To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.").

The FCC cannot interpret ambiguous provisions to give itself jurisdiction. Nowhere could the FCC find any statutory language clearly empowering it to reach intrastate revenues for a federal universal service program. General ancillary authority to issue regulations cannot supply the FCC with substantive authority to tread into a field outside its jurisdiction.

Petitioners base their claim for FCC jurisdiction over intrastate funding solely on their contention that the services to be supported by universal service might include both intrastate and interstate services. The Fifth Circuit was correct that § 254 "does not explicitly say that the FCC has the responsibility to fund intrastate universal services." The FCC was charged with establishing a definition of the services that would be supported by the federal universal service program. Nothing in the statute required the FCC to include intrastate services in this definition. The FCC was given wide rein in determining what services it would support. The same is not true with respect to paying for these programs. The FCC was limited to assessing carriers that provide interstate services.

The FCC's power under § 201(b) is by its own terms limited to "carry[ing] out the provisions of the Act." Where the Act indicates that a given role is to be performed by the states, the general rulemaking power of the FCC cannot be construed to allow the FCC to usurp that role. For example,

the Court acknowledged in *Iowa Utilities Board* that the Act entrusts state commissions with the role of approving interconnection agreements under § 252. While the Court upheld the FCC's power to issue rules to guide state commissions in making these judgments, the FCC does not have the power to issue a rule displacing the states' authority and to assume for itself the role of approving interconnection agreements. Such an action would expressly contradict the statute. Likewise, where § 254 authorizes the States to use interstate revenues to fund universal service, the FCC cannot usurp that authority simply because the statute uses the word "intrastate."

Iowa Utilities Board does not affect the jurisdictional analysis of the Fifth Circuit. This case is not a matter within the FCC's general rulemaking powers, but involves the power to establish universal service funding mechanisms. Not only does the jurisdictional bar established by § 2(b) continue to exist in this "non-rulemaking" arena, the express division of authority between the FCC and the states in § 254 itself controls any authority the FCC arguably has in the intrastate arena. The Court should decline to grant certiorari in this case as the FCC clearly acted beyond its authority by assessing the intrastate revenues of interstate carriers for the school, library and rural health care universal service funds.

Iowa Utilities Board did not state that § 201(b) allows the FCC to take any type of action it wishes with respect to anything covered by the Act, whether interstate or intrastate. Section 201(b) authorizes the issuance of rules and regulations, not fundraising. The authority to assess carriers for universal service funding cannot be found in § 201(b). If it is to exist at all, it must be found elsewhere in the statute. The FCC's authority to raise revenue for universal service exists only in § 254 and extends only to interstate services. Where the Act expressly assigns the role of assessing carriers who provide intrastate services solely to the States, and

directly limits the FCC's authority to interstate services, § 201(b)'s general rulemaking powers cannot supply the missing authority. The jurisdictional limitation of § 2(b), which restricts the FCC's authority over intrastate matters, still applies and has been preserved and extended in the structure of § 254. Congress considered and rejected an amendment to § 2(b) that would have expressly repealed the jurisdictional limitations on the FCC.

It could not have escaped Congress' attention that every carrier providing local telephone service is also an interstate carrier by virtue of the separations process. Every time an interstate call is made, some portion of the local network is put to interstate use and the local carrier recovers that cost in its interstate rates. Even local carriers that do not themselves offer any long distance or out of state services have interstate revenues because of the inevitable interstate usage of the local telephone plant. Thus, the command in § 254(d) that providers of interstate services should contribute to the federal universal service fund (as contrasted with the direction that providers of intrastate services must contribute to state universal service funds) distinguished the revenue base as much as it designated the carrier.

This dual regulatory scheme is repeated elsewhere within § 254. Section 254(b)(5) calls for Federal and State mechanisms to preserve and advance universal service. With respect to the very programs for which the FCC seeks to assess intrastate revenues, Congress did not give the FCC the basic authority to establish the rates that schools and libraries would pay for discounted intrastate services. Instead, the FCC was only to establish the discounts that would apply to interstate services and that the States were to determine the appropriate discounts for intrastate services. § 254(h)(1)(B).

Similarly, in § 254(k), the FCC was empowered to establish cost allocation rules, accounting safeguards and other guidelines to ensure that a service bears no more than

a reasonable share of joint and common costs. However, this empowerment was limited to interstate services; the parallel role with respect to intrastate services was given solely to the States. This consistent statutory structure demonstrates that Congress did not give the FCC authority to control both interstate and intrastate funding of universal service.

Lack of federal authority over intrastate revenues is also implied from § 254(f)'s limitation that State universal service programs may "not rely on or burden Federal universal service support mechanisms." If the FCC had the power to reach intrastate revenues, § 254(f) might allow it to preempt states from using those same revenues for state universal service. That would leave states with no source of funding for intrastate universal service programs, a result that Congress could not have intended. Exactly the opposite, Congress intended to keep intrastate revenues out of the hands of the FCC.

Given the specificity with which Congress divided interstate and intrastate authority between the FCC and the states, the historic bright line that exists between interstate and intrastate regulation of telecommunications, and the absence of any express grant of intrastate jurisdiction to the FCC, § 2(b) demands much more before the FCC can encroach on areas reserved to the states.

There is no indication that Congress intended to change the jurisdictional responsibilities between federal and state government over interstate and intrastate revenues. Section 254(d) only identifies providers of "interstate telecommunications services" as contributors to the federal support mechanisms.[10] Providers of "intrastate

[10] If this language allows the FCC to reach intrastate revenues of an interstate carrier as well, then it also would allow states to assess interstate revenues of intrastate carriers, a result that the FCC and the Petitioners have never accepted. *See AT&T Communications of*

telecommunications services" are only mandated to contribute to state support mechanisms. § 254(f). Prior Senate versions of the 1996 Act, S. 652, that explicitly placed intrastate carriers within the category of mandatory contributors to the federal fund were not adopted.

The Fifth Circuit's decision was not in error, nor was it "startling." The Fifth Circuit did not conclude that the FCC had no authority over any of the intrastate aspects of universal service. The court upheld most of the FCC's determinations, including the definition of the services eligible for support. Had the court believed the FCC had no authority whatsoever with respect to intrastate services, it could not have upheld these actions. Petitioners are taking the language used by the court when it drew the conclusion that intrastate funds were off limits out of context. The "parade of horribles" they conjure up does not follow from the decision. This was a narrow, focused result that has no impact on any other aspect of the FCC's role under § 254. The court made no broad holding that the FCC was powerless to implement § 254. It simply decided the obvious, that the FCC has no power to assess intrastate revenues.

2. The Fifth Circuit's decision is not of significant practical consequence to Petitioners. While the decision below causes all of the contributions to the federal universal service funds to come from interstate revenue, this is what the statute provides. This result is far more equitable to carriers than the FCC's original plan which required carriers to contribute on all revenues, interstate and intrastate, but recover that cost from only interstate customers. Now,

---

the Mountain States, Inc. v. Public Serv. Comm'n, 625 F. Supp. 1204 (D. Wyo. 1985) (striking down charges imposed by Wyoming state commission based on interstate revenues of interstate carriers to fund intrastate programs).

interstate carriers contribute based only on their interstate revenues and recover their contributions only from interstate customers. The ultimate source of recovery is no different now than it ever was -- interstate customers. However, instead of predominantly intrastate carriers having to recover disproportionate costs in rates for interstate services, at a substantial competitive disadvantage, now all carriers compete head to head on a precisely equal basis. There is no unfairness or illegality in this result.

Petitioners argue that the federal funding mechanism should spread the burden across the broadest possible funding base, but that the Fifth Circuit "forc[ed] the burden of the funding to be concentrated on a smaller set of interstate ratepayers." First, Petitioners have their facts wrong. The FCC had always limited the ultimate cost recovery to interstate ratepayers. Second, the FCC is without the power to create a broader funding base that would include intrastate ratepayers. The only way the FCC could broaden the ultimate funding base would be to require carriers to recover some portion of their federal universal service contribution from intrastate ratepayers. The FCC cannot do this, as it would be in direct collision with § 2(b).

Petitioners do not seek review of, but still complain about, the Fifth Circuit's decision with respect to eligibility criteria to receive universal service support payments. First, Petitioners misrepresent the Fifth Circuit's decision on that issue. The court below did not state that the FCC had no authority to establish eligibility requirements; it held that the FCC could not prohibit the states from establishing additional eligibility requirements. Second, the court expressly declined to decide that issue on jurisdiction, but interpreted the statute as allowing states to establish additional eligibility requirements. Extension of the Fifth Circuit's jurisdictional analysis to the issue of eligibility criteria poses no danger as the FCC's rule was already overturned on these other

grounds. Third, no party is seeking certiorari on the issue of eligibility criteria. Curiously, that is the only issue Petitioners addressed in their supplemental letter briefs before the Fifth Circuit (choosing not to address the issue of the FCC's right to use intrastate revenue to fund federal universal service programs). Finally, Petitioners' criticism of the Fifth Circuit's decision on eligibility criteria is that it may give States some control over programs supported by federal funding. This result is not shocking. Section 254(h)(1)(B) empowers only the states to determine the discounts that apply to intrastate services supplied to schools and libraries, even though the federal fund may support those services.

Petitioners argue that the decision below may frustrate the administration of universal service in the future, without providing any concrete explanation of how this is so. They argue that the FCC may be unable to enforce § 254(f)'s prohibition on states burdening the federal mechanisms if such action would impact state funding programs. Petitioners do not explain how this could result from the Fifth Circuit's ruling and simply invent scenarios that have no likelihood of ever occurring. The statute says quite directly that states cannot burden the federal funding mechanism, so there should be no question that the FCC could take action to try to enforce the statute if a state attempted to do that. It is precisely the FCC's power to do so that makes the FCC's assertion of jurisdiction over intrastate revenue a threat to the States.

If the FCC could reach intrastate funding (as it apparently believes it can), the FCC could effectively prevent states from operating any intrastate universal service program of which the FCC does not approve. Invoking § 254(f)'s prohibition on burdening the federal funding mechanism, the FCC could dictate to the states what they can and cannot do if they wish to use the same funding base as the FCC. Once the FCC is given that power, the States effectively have no

power. The FCC rule at issue was an unauthorized intrusion on the states' jurisdiction.

Petitioners relegated the issue of whether universal service assessments constitute a "charge" in connection with intrastate services to a footnote. This is a fundamental point when interpreting § 2(b). The FCC contended that § 2(b) was not implicated when it assessed contributions for universal service support from intrastate revenues because this was not "regulation" of intrastate services in violation of § 2(b). The FCC said it was "merely" calculating a federal charge based on both interstate and intrastate revenues, which was distinct from regulating the rates and conditions of interstate service. ¶821. However, this "mere calculation" imposes of millions of dollars of costs on carriers solely because of their intrastate operations, which the FCC does not have the authority to impose. Using intrastate revenues as a funding base created a new cost of doing business for intrastate carriers. It is not important that the FCC did not attempt to directly control intrastate rates.

Petitioners likewise contend that using intrastate revenues for purposes of the universal service contribution base was not regulation of the charges for intrastate communications services. This evades the issue by stating it too narrowly. Section 2(b) states that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . *charges*, classifications, practices, services, facilities, or regulations for or *in connection with intrastate communication service* . . . ." 47 U.S.C. § 152(b) (emphasis added). "By its terms, this provision fences off from FCC reach or regulation intrastate matters -- indeed, including matters 'in connection with' intrastate service." *Louisiana*, 476 U.S. at 370. Any time the FCC imposes a federal charge based on intrastate revenue, it has created a consequence for that carrier purely as a result of a carrier's intrastate business. Giving the FCC the power

to base federal regulation on a carrier's intrastate business would be giving the FCC the right to regulate that intrastate business. Since the carrier would not be subject to the federal regulation without the intrastate revenues, the FCC has crossed the § 2(b) line by using them as a basis for regulation.

The Petitioners save their weakest argument for last - that a larger assessment base permits the FCC to have a larger universal service fund, necessary to meet the "sufficiency" requirement. This argument directly contradicts Petitioners' contention that the FCC only uses intrastate revenues as a "reference point" for a calculation. Because all cost recovery comes solely through interstate charges, the amount of intrastate revenues is not the determinant of how large the fund can be, the cost recovery base is. It makes no difference how much intrastate revenue exists; carriers can look only to interstate customers for cost recovery. The FCC's ability to increase the size of the fund is dependent on how much cost the interstate customers can bear. Intrastate revenues only make a difference to the sufficiency of the fund if the FCC could force intrastate cost recovery, a result plainly barred by § 2(b). Excluding intrastate revenue from the assessment base has no adverse effect on the FCC's ability to set the size of the fund. Nor does this have any adverse effect on the States' own efforts to promote universal service. In any event, § 254's directive that universal service support mechanisms be "sufficient" does not override § 2(b). Nothing in the directive to make support mechanisms sufficient constitutes an unambiguous directive that they are to be made sufficient by assessing intrastate revenue.

3. Because it found for Cincinnati Bell on the jurisdiction issue, the Fifth Circuit did not address the argument that the FCC's assessment and cost recovery mechanism was discriminatory. That argument provides further support for not disturbing the decision below.

The FCC claimed that it minimized any perceived jurisdictional difficulties under § 2(b) by not requiring carriers to seek state authorization to recover their school, library and rural health care fund contributions attributable to intrastate revenues.[11] However, by requiring carriers to include intrastate revenues in their federal universal service contribution bases and to recover all of these costs in their interstate rates, the FCC violated the principle of competitive neutrality.

Requiring carriers that provide both interstate and intrastate services to contribute to the school, library and rural health care funds on the basis of both revenue streams, but to recover those costs from only interstate customers, discriminated against carriers whose revenues are predominantly intrastate. These carriers would be burdened with the requirement of recovering the cost of their disproportionately large contributions solely from their interstate services.

The FCC's decision to assess interstate and intrastate revenues, but limit recovery of such amounts to a carrier's interstate charges, was unlawful and in direct conflict with the principles of non-discrimination and competitive neutrality. Although the FCC created a new explicit subsidy, it mandated that the cost of the subsidy be recovered from competitive services that would have unequal effects on different competitors. To saddle one carrier with a requirement to recover the cost of universal service funding based on interstate and intrastate revenues when the other carrier must only recover assessments based upon interstate revenues, is not competitively neutral.

---

[11] Nevertheless, the FCC asserted that it had the power to do so. The FCC cannot require states to adjust intrastate rates to recover contributions to federal universal service.

CONCLUSION

There was no error in the Fifth Circuit's decision on the jurisdiction issue. If the FCC was allowed to use intrastate revenues, any limits on its ability to regulate intrastate service would be in jeopardy. The Fifth Circuit decision does not harm the interests of the States or intrastate ratepayers. To the contrary, the decision strengthens States' independent authority. Nevertheless, Petitioners are not seeking to protect the interests of the States. No State has sought to overturn the jurisdiction decision. Petitioners brought this petition out of self-interest to minimize the amount universal service cost recovery they have to collect directly from their retail customers. However, shifting those costs back onto intrastate carriers would not make them go away; it would just change the mechanism by which they are passed on to the end user. The FCC had placed intrastate carriers at a competitive disadvantage, which threatened their ability to recover their universal service contributions. The Fifth Circuit's decision eliminated this risk for all carriers. The decision correctly interprets *Iowa Utilities Board*, § 2(b) and § 254. The Court should deny the petition.

Respectfully submitted,

/s/_____
Douglas E. Hart
FROST & JACOBS LLP
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6709